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DISQUALIFICATION OF FEDERAL JUDGES BECAUSE OF PERSONAL BIAS OR PREJUDICE UNDER SECTION 21 OF THE JUDICIAL CODE.—The judicial system of a people and the administration of justice in their courts can be taken as an unerring index to their state of civilization. The outward expression and manifestation of a people's development can be gathered from their conception of rights, duties of individual to individual, and of individuals to the body politic, which conception is made evident through a system of laws. The higher the development of a people, the higher will be this conception of their rights and duties; the higher this conception, the more perfect the system of justice. The laws of a retarded people reveal their undeveloped state, while the Code of Hammurabi reveals a Babylon in the foreground of advanced peoples of the pre-Christian era. The history and evolution of our system of trial by jury, in a degree, is the history and development of a people.[1] Through these laws and systems, one can read the

[1] See interesting article by Chas. T. Coleman, "Origin and Development of Trial by Jury", 6 VA. LAW REV. 77.

social, economic, industrial and even the spiritual development of the separate groups.

The position of the judge in these divers systems of law is an indication, together with the laws he administers, of the position of the people in the scale of civilization. "The behavior which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles."[2] In one system he may be vested with absolute power—an autocrat within his province; in another he may be vested with a delicate authority and discretion; while in a third he is but a passive arbiter. In one system, not all the interest or prejudice of the judge can dislodge him from his fortified position on the bench; in another, circumstances alone which might tend toward favoritism or bias are sufficient to disqualify him from sitting in judgment.

In this respect the common law has shown, in a measure, a more delicate perception of justice and a better appreciation of the proper relation between judge and litigant. It was well aware that interest in the controversy on the part of the judge was not conducive to justice. Parties were to have a fair trial conducted by an impartial judge. The maxim that no man can be a judge in his own cause [3] has become deeply imbedded in the common law, so that if a judge is interested in a suit, though brought in the name of another, he is disqualified.[4] Interest in the cause and a too near relationship [5] to the parties raises a presumption against the fitness of the judge to administer justice unswayed by human bias and prejudice.[6]

Here the common law stopped. Personal bias and prejudice, not the result of interest or kinship, were not recognized at common law.[7]

> "* * * The experience of statesmen, lawyers and judges for centuries had taught that it was not wise to allow a challenge of a judge on the allegation of personal bias or prejudice, an intangible fact, a mere mental status which is hard to prove and still harder to disprove, and that the abuse and evil resulting from allowing such challenges would far outweigh any good which might be effected by permitting them." [8]

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[2] 2 POLLOCK AND MAITLAND, HISTORY OF ENGISH LAW, 670.

[3] 17 AM. & ENG. ENC. LAW, 2d. ed. 732.

[4] The general rule is that the interest must be pecuniary in nature, and not remote, uncertain, speculative or merely incidental. Meyer *v.* San Diego, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762; Clyma *v.* Kennedy, 64 Conn. 310, 29 Atl. 539; City of Grafton *v.* Holt, 58 W. Va. 182, 52 S. E. 21.

[5] By the unwritten law this includes the fourth degree of consanguinity or affinity. Roberts *v.* Roberts, 115 Ga. 259, 41 S. E. 616.

[6] See State *v.* Ham, 24 S. D. 639, 124 N. W. 955; 2 VA. LAW REV. 147.

[7] Fulton *v.* Longshore, 156 Ala. 611, 46 So. 989, 19 L. R. A. (N. S.) 602; Bulwer Co. *v.* Standard Co., 83 Cal. 613, 23 Pac. 1109.

[8] *Ex parte* N. K. Fairbank Co., 194 Fed. 978.

But as the judge making the above statement concluded, "The fact, however, that this had been the rule for centuries past does not necessarily prove that the old rule was the wisest." With the passing of time our conception of justice takes on a finer garb. We soon learn to realize that that which is, is not necessarily that which ought to be. Time along with experience, the great moulder of the character of the individual, though with a slower process, shapes in a like manner the plastic moulds of a people's character and viewpoint. With the passing of time, the common law presumption of the absolute rectitude of the judge in the discharge of his duties and the positive absence of personal favor or bias gradually began to undergo a change. Statutes, early in the history of England,[9] gave expression to this tendency, until now the common law has been modified in almost every State in the Union either by statute or by rulings of the courts. Personal favor, bias or prejudice which would have disqualified him as a juror will now disqualify him as a judge.[10] Not only are such disqualifications intended as a benefit to the litigants in the suit, but more, perhaps, as a declaration of the public policy of a State. It is to preserve the purity and impartiality of the courts, to retain and foster confidence of the people in their integrity and decisions. As was said by one court, "Public confidence in our judicial system and the courts of justice demands that causes be tried by unprejudiced judges, and a denial of a change of judge will be presumed to be a denial of justice."[11]

This tendency found its way into our federal courts through section 21 of the Judicial Code. It reads in part, as follows:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. * * *"

Judge Jones, in *Ex Parte N. K. Fairbank Co.*,[12] finds the reason for the section in the fact that Congress may have "believed that the judges in these days are not as impartial as their predeces-

[9] "No man of law shall thenceforth be justice of assize or of the common delivery of jails in his own country." 8 Rich. II, c. 2.
"No justice nor other man learned in the law of this realm shall use or exercise the office of justice of assize within any county where the said judge was born or doth inhabit, on pain to forfeit for every offence contrary to said act 100 pounds." 33 Henry VIII, c. 24. Cited in *Ex parte* N. K. Fairbank Co., *supra*.

[10] State *v.* Board of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706 and note.

[11] *Ex parte* Ellis, 3 Okla. Cr. 720, 105 Pac. 184, 25 L. R. A. (N. S.) 653.

[12] *Supra*.

sors were in the past"; that "Congress thought there was an evil which should be remedied by changing the old rule". It is a mistake to suppose that the section was intended as a slur upon the integrity of the present judges and a reflection upon their judicial temper. It was rather a recognition by Congress of human instincts, even among judges; of the fact that cases may arise when they are swayed by human passions and human emotions. The evil of personal prejudice, for the prejudice must be personal,[13] is removed without hurt to the judge or the parties interested. By far more acceptable, because it is within the realm of reason and the spirit of the section, is the reason ascribed to Congress for passing the section in the recent case of *Berger* v. *United States,* 41 Sup. Ct. 230. In the opinion, Justice McKenna said: "* * * we may say that its (sect. 21) solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment."

The act explains its own purpose and the reason for its being. And be it said to the everlasting glory of the federal judges that few litigants have found it necessary to resort to the provisions of this act, and fewer still have had a real basis for such request—a change of judge because of bias.

To take advantage of this privilege, the affiant must draw his affidavit properly, setting forth the facts showing bias or favor,[14] accompanied by a certificate of counsel that such application was made in good faith and filed "certainly before the trial of the case commences, unless good reason to the contrary is shown".[15] The statute must be strictly followed.[16] Upon the filing of the affidavit, the trial judge[17] does not pass upon the sufficiency or truth of the facts set forth, his duty being to determine their legal sufficiency only. In the words of Judge Meek:[18]

> "Upon the making and filing by a party of an affidavit under the provision of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty

[13] Henry *v.* Speer, 201 Fed. 869.

[14] The facts relied upon to show prejudice must ante-date the trial. "It was not intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise * * *." *Ex parte* American Steel Barrel Co., 230 U. S. 35.

[15] *Ex parte* Glasgow, 195 Fed. 780.

[16] "Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions." Henry *v.* Speer, *supra.*

[17] Section 21 does not apply to judges of the appellate courts. Kinney *v.* Plymouth Rock Squab Co., 213 Fed. 449.

[18] Henry *v.* Speer, *supra.*

to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

In the recent case of *Berger* v. *United States, supra,* section 21 was considered at length. Victor L. Berger, the Socialist Congressman, together with others, was charged with a violation of the Espionage Act of June 15, 1917. In due time affidavit was filed, invoking section 21 of the Judicial Code and charging Judge Landis, the trial judge, with personal bias and prejudice because of defendants' German descent, as shown by the utterances attributed to the judge. The affidavit having been filed, the court was moved for the assignment of another judge to preside at the trial. The motion was denied and the defendants convicted and sentenced. From this conviction and sentence the case was taken to the United States Circuit Court of Appeals. That court certified three questions to the Supreme Court.

1. As to the sufficiency of the petition of the affiants. The majority of the court answered in the affirmative. It is not necessary that the petition be based upon facts in the knowledge of the petitioners and that have been uncontroverted. It is sufficient though the averred facts be based upon information received from others or based upon mere belief. To refuse applications based upon such averments "would be arbitrary and makes its (sect. 21) remedy unavailable in many, if not in most cases". The court said:

"We are of the opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? * * *"

2. As to the lawful right of the trial judge to pass upon the sufficiency of the affidavit of his prejudice, or upon any question arising out of the filing of the affidavit. To this question the court again answered in the affirmative. In this respect the judge may pass upon the legal sufficiency of the affidavit. That is the only question that the trial court is to determine. In the words of the court, "* * * the section withdraws from the presiding judge a decision upon the truth of the matters alleged".

3. As to the lawful right and power of the trial judge to preside on the trial after the filing of the affidavit of prejudice. The court answered in the negative. The mere filing of the affidavit averring prejudice, certified by counsel, works an immediate cessation of all acts by the judge against whom bias is charged. He

withdraws from the case, and in his stead another judge is designated. The reason assigned by the court is both rational and within the spirit of the act:

> "And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Despite the dissenting opinions of Justices Day and McReynolds, it is believed that the decision of the court is correct and within the spirit of the section. It is in full accord with the progressive tendency of the day. Justice is not frustrated; on the contrary, it is assured by removing any possible suspicion of prejudice, by removing the judge upon belief of prejudice and facts gleaned from other sources that may establish prejudice. Justice is not seriously hampered, for the act allows but one sling, one affidavit and only one. No harm is done, though the judge removed had no bias in fact and was free from favor. Furthermore, prosecution for perjury and the disbarment of conniving and unscrupulous attorneys are checks against affidavits founded upon mere caprice and with intent to defeat justice. As the court well said, what inducement would litigants have in filing affidavits without merit, what advantage is there in being tried by one impartial judge rather than by another?

M. A. S.

WHAT IS AN ACT OF WAR UNDER A WAR EXEMPTION CLAUSE IN A LIFE INSURANCE POLICY?—A recent case arising out of the Lusitania catastrophe has presented to our courts the interesting problem of determining what constitutes an act of war.

In this case, *Vanderbilt* v. *Travelers' Life Ins. Co.*,[1] decided in the New York Supreme Court in June 1920, the question arose through a war exemption clause in the decedent's life insurance policy. Here the decedent insured held a life insurance policy with the defendant, the insurer, in which it was expressly provided: "Nor shall this insurance cover * * * death * * * resulting, directly or indirectly, wholly or partly, from * * * war or riot." The insured, a neutral passenger on board the Lusitania, lost his life by drowning when the latter ship was illegally [2] torpedoed and sunk by an ordered act of a German submarine. It was held that this constituted an act of war, and hence

[1] 184 N. Y. Supp. 54.
[2] The Lusitania, 251 Fed. 715.